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In the Supreme Court of the United States

WEYERHAEUSER COMPANY, PETITIONER

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a plaintiff alleging that a defendant engaged in "predatory bidding" constituting exclusionary conduct for purposes of Section 2 of the Sherman Act, 15 U.S.C. 2, must prove that the defendant suffered a loss in the short term and that it had a dangerous probability of recouping its loss in the long term.

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Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986) 20

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INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws and share a strong interest in the proper application of those laws. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Petitioner and respondent operated sawmills in the Pacific Northwest. The predominant hardwood species in that region is alder. Petitioner and respondent purchased alder sawlogs from landowners or loggers and processed them into hardwood lumber, which is used in consumer goods such as furniture and cabinetry. Sawlogs represent as much as 75% of an alder sawmill's total cost in producing finished lum-

ber. Because alder sawlogs degrade quickly and are expensive to transport, alder sawmills typically obtain their sawlogs from no farther than 100 miles away. J.A. 152a, 153a, 169a; Pet. App. 2a-3a.

Respondent operated a single alder sawmill in Longview, Washington, starting in 1962. Petitioner entered the Pacific Northwest alder lumber business in 1980, and now operates six alder sawmills in the region. During the relevant period, petitioner's share of the Pacific Northwest market for alder sawlogs was approximately 65%; petitioner's share of North American sales for all hardwood lumber, however, was less than 3%. J.A. 700a; Pet. App. 3a.

From 1998 to 2001, the price of alder sawlogs increased while the price of hardwood lumber decreased. As the margin between those prices narrowed, 31 alder sawmills in the Pacific Northwest, including respondent's, became unprofitable and closed. During that same period, however, four new alder sawmills opened. Pet. App. 3a, 23a n.57.

2. After closing its plant, respondent brought suit against petitioner in the United States District Court for the District of Oregon, contending, *inter alia*, that petitioner had engaged in monopolization and attempted monopolization of the Pacific Northwest alder sawlog market, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.[1] Specifically, respondent alleged that petitioner had engaged in four types of exclusionary conduct to reduce or eliminate competition in the alder sawlog market: "(1) predatory overbidding (i.e., paying a higher price for sawlogs than necessary); (2) overbuying (i.e., buying more sawlogs than it needed); (3) entering [into] restrictive or exclusive agreements with sawlog suppliers; and

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[1] Two other alder sawmill owners, Confederated Tribes of Siletz Indians of Oregon and Smokey Point Hardwoods, Inc., were also plaintiffs in the original lawsuit. Their claims were either dismissed or rejected by the jury. J.A. 2a, 3a.

(4) making misrepresentations to state officials in order to obtain sawlogs from state forests." Pet. App. 3a-4a.

The case was tried before a jury. At the close of the evidence, the district court instructed the jury that, in order to prevail on its monopolization and attempted-monopolization claims, respondent was required to prove that petitioner had engaged in anticompetitive (or exclusionary) conduct. J.A. 973a, 979a. The court defined "anticompetitive conduct" in general as "conduct that has the effect of wrongly preventing or excluding competition[] or frustrating or impairing the efforts of other firms to compete for customers within the relevant market." J.A. 977a. The court noted, however, that "[n]ot everything that enables a company to gain or maintain a monopoly is anti-competitive," *ibid.*, and that "[a]nti-competitive conduct does not include ordinary means of competition," J.A. 977a-978a. The court advised the jury that, in determining whether conduct is anticompetitive, it should consider "whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials or customers, or if the anticipated benefits of the conduct flow primarily from its tendency to hinder or eliminate competition." J.A. 977a.

With reference to respondent's "predatory bidding" and "overbuying" claims, the district court gave the jury the following, more specific instruction:

> One of [respondent's] contentions in this case is that [petitioner] purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act.

J.A. 978a. Petitioner objected to that instruction, reasoning that respondent's claim that it had engaged in predatory *bid-*

ding was analogous to a claim that the *seller* of a product had engaged in predatory *pricing*. Under this Court's decision in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), a plaintiff alleging predatory pricing must show (1) that the defendant had engaged in below-cost pricing in the short term and (2) that the defendant had a dangerous probability of recouping its losses in the long term. Petitioner contended that a plaintiff alleging predatory bidding must make the same showing. The district court, however, ultimately overruled that objection. J.A. 725a-730a.

The jury found that petitioner had engaged in monopolization and attempted monopolization of the market for alder sawlogs and awarded respondent approximately $26.3 million in damages, which the district court trebled to approximately $78.8 million. Pet. App. 4a.[2] The district court then denied petitioner's motions for judgment as a matter of law and for a new trial. *Id.* at 28a-46a.

3. The court of appeals affirmed. Pet. App. 1a-27a.

a. The court of appeals framed the relevant question as "whether the prerequisites set forth in [*Brooke Group*] for establishing liability in sell-side predatory pricing cases apply in cases where a defendant engages in buy-side predatory bidding by raising the cost of inputs." Pet. App. 5a. The court concluded that "*Brooke Group* does not control in the buy-side predatory bidding context at issue here." *Ibid.*

The court of appeals acknowledged that the antitrust laws are "concerned with competition on the buy-side of the market as much as on the sell-side of the market," because "[b]oth sides of the market affect allocative efficiency, and hence con-

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[2] The jury rejected, however, respondent's claim that petitioner had engaged in monopolization or attempted monopolization of the market for finished alder lumber, finding that there was no distinct market for finished alder lumber (as opposed to finished hardwood lumber more generally). J.A. 967a.

sumer welfare." Pet. App. 6a. The court of appeals explained that, in *Brooke Group*, this Court had "established a high liability standard for sell-side predatory pricing cases because of its concern with the facts that consumers benefit from lower prices and that cutting prices often fosters competition." *Id.* at 8a. The court of appeals further recognized that, "in buy-side predatory bidding cases, as in sell-side predatory pricing cases, the price level itself is the anticompetitive weapon." *Ibid.*

The court of appeals nevertheless concluded that claims of predatory bidding were distinguishable from claims of predatory pricing because "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." Pet. App. 9a. With regard to the benefit to consumers in the downstream market, the court reasoned that, in the short term, when a firm "pays more for materials * * * and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases," "[n]o consumer benefit results * * * if the firm raises or maintains the same price level for its finished products." *Id.* at 9a-10a. While consumers in the downstream market would benefit in the short term if the firm lowered the price level for its finished products, the court continued, such lower prices would merely "place even greater pressure on competitors, thereby increasing the threat to competition arising from the predatory bidding." *Id.* at 10a. In the long term, the court reasoned, when a firm seeks to "recoup the higher costs it had paid for its materials," "[t]he firm would have little incentive to pass on the benefit of lower input prices to consumers when it possessed greater market power and needed to recoup the higher costs it had paid for its materials." *Id.* at 10a-11a. Therefore, the court concluded, "the overall effect of a predatory bidding scheme would result in harm to consumers." *Id.* at 11a.

With regard to the stimulation of competition in the upstream market, the court of appeals recognized that, in some situations, "rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements." Pet. App. 11a. The court determined, however, "[t]he nature of the input supply at issue here does not readily allow for market expansion." *Ibid.* Based on that determination, the court reasoned that, "at least in this case, predatory bidding is less likely than predatory pricing to result in * * * the stimulation of competition." *Ibid.* The court thus concluded that "the high standard of liability in *Brooke Group* does not apply here because this case involves predatory bidding in a relatively inelastic market, not predatory pricing." *Ibid.*

Having decided that "*Brooke Group* does not govern in this case," Pet. App. 13a, the court of appeals sustained the district court's instructions, including the "relevant * * * instruction" that required the jury to find merely that petitioner "paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price." *Id.* at 7a n.8, 14a n.30; see J.A. 978a. The court rejected petitioner's assertion that the jury should have been instructed, consistent with *Brooke Group*, that "overbidding for sawlogs could be anticompetitive conduct only if [petitioner] operated at a loss and a dangerous probability of [petitioner's] recoupment of its losses existed." Pet. App. 13a.

The court of appeals then determined that substantial evidence supported the jury's verdict on respondent's attempted-monopolization claim (and thus did not consider the jury's verdict on respondent's monopolization claim). Pet. App. 16a n.38, 17a. The court found that there was "substantial evidence of overbidding for sawlogs to support the jury's

finding of anticompetitive conduct" (and thus did not "analyze whether substantial evidence support[ed] the other alleged anticompetitive acts"). *Id.* at 18a.[3] The court also found that there was substantial evidence to support the other elements of respondent's attempted-monopolization claim: specifically, that petitioner had acted with specific intent to eliminate competition, *id.* at 18a-20a, and that petitioner had a dangerous probability of achieving monopoly power in the relevant market (*i.e.*, the Pacific Northwest alder sawlog market), *id.* at 20a-25a. Finally, the court of appeals upheld the jury's damages award, *id.* at 25a-26a, and the district court's award of attorney's fees and costs, *id.* at 27a.

SUMMARY OF ARGUMENT

A. The court of appeals mistakenly held that a plaintiff can establish "predatory bidding" in violation of Section 2 of the Sherman Act simply by persuading a jury that the defendant purchased an input at a price that was "higher * * * than necessary" for the purpose of preventing competitors from obtaining that input at a "fair" price. In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court held that a plaintiff alleging that the seller of a product had engaged in predatory pricing must show (1) that the defendant had engaged in below-cost pricing in the short term and (2) that the defendant had a dangerous probability of recouping its losses in the long term. Notably, the Court adopted such a standard even though it recognized

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[3] In concluding that there was substantial evidence of predatory bidding, the court of appeals cited evidence that (1) the price of alder sawlogs increased while the price of hardwood lumber decreased; (2) petitioner had a dominant share of the market for alder sawlogs; (3) petitioner suffered "declining profits" because of the high prices it was paying for raw materials; and (4) petitioner employed a deliberate strategy of raising the price of alder sawlogs. Pet. App. 17a-18a.

that it might permit some anticompetitive conduct, out of concern that a broader standard could lead to "false positives" and chill procompetitive conduct. Because a claim of predatory bidding by a buyer is closely analogous to a claim of predatory pricing by a seller, the *Brooke Group* standard should be applied to a claim of predatory bidding as well.

The court of appeals distinguished predatory bidding from predatory pricing on the ground that predatory bidding does not necessarily produce benefits for consumers in the downstream (or finished-product) market. The court of appeals erred, however, by losing sight of the Sherman Act's overriding purpose of protecting the competitive process. Like aggressive price-cutting by the seller of a finished product, aggressive bidding by the buyer of an input is often (and indeed usually) procompetitive. An increase in the bid price is often simply the result of increased purchasing by a large buyer in a market with inelastic supply. In the vast majority of cases, such increased purchasing reflects procompetitive expansion by a relatively efficient buyer, designed to enable the buyer to increase its output. Aggressive bidding for an input sends important signals to the market, and harm to competition occurs only if the bidder is able to recoup any losses. Moreover, at least when the bidder does not acquire significant market power in the downstream market as a result of its predation in the upstream (or input) market, downstream consumers are unlikely to suffer any detrimental effects from the bidder's behavior. Indeed, downstream consumers will ordinarily benefit from aggressive bidding in the upstream market, because robust competition in that market benefits the most efficient producers (which, in turn, are most likely to generate innovations or cost savings that will benefit downstream consumers in the future). Application of the *Brooke Group* standard is warranted to avoid prohibiting (or deterring) such procompetitive conduct.

The *Brooke Group* standard can readily be adapted to a claim of predatory bidding, and there is no justification for refusing to apply that standard in this case. The court of appeals suggested that the *Brooke Group* standard should not apply to predatory bidding in a market with "relatively inelastic" supply. But it is precisely in such a market that allegations of predatory bidding are likely to arise, yet the increase in the price of an input may be nothing more than the manifestation of procompetitive buying for the purpose of increasing production. Accordingly, it is precisely when supply is inelastic that courts need to guard against the risk of imposing liability on procompetitive conduct. In *Brooke Group*, the Court did not attach independent significance to demand elasticity in the relevant market in formulating its standard for predatory-pricing claims, and there is no justification for attaching significance to supply elasticity here. In any event, a limiting principle based on "relative inelasticity" would be entirely unworkable, as it would introduce ambiguity and uncertainty into the otherwise objective *Brooke Group* test.

B. The jury instruction approved by the court of appeals in this case would permit the imposition of liability for predatory bidding absent a showing that the alleged predator had met either of the *Brooke Group* requirements. And it would establish a standard that turns on a subjective determination of whether the price paid for the relevant input was "higher * * * than necessary" or not "fair." If allowed to stand, such a subjective standard will have the effect of deterring procompetitive conduct. This Court has abjured such subjective standards in other Section 2 contexts, and it should do so again here.

ARGUMENT

THE COURT OF APPEALS ERRED BY UPHOLDING THE JURY INSTRUCTION ON RESPONDENT'S "PREDATORY BIDDING" CLAIM

This case involves a claim of "predatory bidding" by the buyer of an input. As the court of appeals noted, "[i]n a predatory bidding scheme, a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases." Pet. App. 9a-10a. In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court held that a plaintiff alleging that the seller of a product had engaged in predatory pricing must show (1) that the defendant had engaged in below-cost pricing in the short term and (2) that the defendant had a "dangerous probability" of recouping its losses in the long term. *Id.* at 222, 224. Because predatory bidding by a buyer is closely analogous to predatory pricing by a seller, the requirements of *Brooke Group* are also applicable to a claim of predatory bidding. The court of appeals erred in this case by approving an instruction that allowed the jury to award treble damages for predatory bidding without finding that respondent had met either of the *Brooke Group* requirements.

A. In Order To Prevail On A "Predatory Bidding" Claim, The Plaintiff Must Prove That The Defendant Suffered A Short-Term Loss And That The Defendant Had A Dangerous Probability Of Recouping Its Loss

Section 2 of the Sherman Act, 15 U.S.C. 2, imposes liability for two types of unilateral conduct: monopolization and attempted monopolization. Section 2 does not prohibit the possession of monopoly power standing alone; instead, it prohibits willfully acquiring, attempting to acquire, or maintaining mo-

nopoly power through anticompetitive, or "exclusionary," conduct. See, *e.g.*, *Verizon Commc'ns, Inc.* v. *Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 407 (2004); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458-459 (1993); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). Conduct is exclusionary when it tends to exclude competition "on some basis other than efficiency," *i.e.*, when it "tends to impair the opportunities of rivals" but "either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605 & n.32 (citations omitted).

This Court has often recognized "the difficulty of identifying and remedying anticompetitive conduct by a single firm," *Verizon*, 540 U.S. at 408, due to the fact that "the means of illicit exclusion, like the means of legitimate competition, are myriad," *id.* at 414 (citation omitted). The Court has emphasized, however, that "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Ibid.* (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). Accordingly, the Court has stressed the importance of "avoid[ing] constructions of § 2 which might chill competition, rather than foster it." *Spectrum Sports*, 506 U.S. at 458. The Court has also noted that "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) (citation omitted) (brackets in original).

1. *The* Brooke Group *Standard Was Adopted In The Predatory-Pricing Context In Order To Avoid Chilling Procompetitive Conduct*

In *Brooke Group*, the Court provided specific guidance as to when aggressive price-cutting by the seller of a product

constitutes a particular form of exclusionary conduct known as "predatory pricing."[4] The Court rejected the proposition that it would be sufficient for a plaintiff alleging predatory pricing to show simply that the defendant lowered its prices in order to injure or exclude rivals. Instead, the Court held, such a plaintiff must prove that (1) "the prices complained of are below an appropriate measure of its rival's costs," 509 U.S. at 222, and (2) "the competitor had * * * a dangerous probability[] of recouping its investment in below-cost prices," *id.* at 224.

In support of that standard for predatory-pricing claims, the Court supplied several justifications. With regard to the below-cost-pricing prong of the standard, the Court emphasized that "[l]ow prices benefit consumers regardless of how those prices are set." *Brooke Group*, 509 U.S. at 223 (quoting *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). In addition, the Court noted that, when a company sets its price above the cost of its product, a low price often "reflects the lower cost structure of the alleged predator, and so represents competition on the merits." *Ibid.* A rule that imposed liability for price-cutting even when a company engages in *above*-cost pricing, the Court reasoned, could conceivably "render illegal any decision by a firm to cut prices in order to increase market share." *Ibid.* (quoting *Cargill*, 479 U.S. at 116). Imposing liability only for below-cost pricing thus ensures that antitrust suits will not "bec[o]me a tool for keeping prices high." *Id.* at 227.

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[4] Although *Brooke Group* involved a claim for primary-line price discrimination under the Robinson-Patman Act, 15 U.S.C. 13(a), rather than a predatory-pricing claim under Section 2, the Court made clear that "the essence of the claim under either statute is the same," and accordingly the same "two prerequisites to recovery" apply "whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act." 509 U.S. at 222.

With regard to the recoupment prong of the standard, the Court stressed that "[r]ecoupment is the ultimate object of an unlawful predatory pricing scheme," because "it is the means by which a predator profits from predation." *Brooke Group*, 509 U.S. at 224; see *Matsushita*, 475 U.S. at 588-589 (noting that it would be "irrational" for a company to suffer short-term losses unless it had a "reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered").[5] To the extent that price cutting that does not result in recoupment produces lower prices in the market, the Court explained, it would actually *enhance* consumer welfare. *Brooke Group*, 509 U.S. at 224.

In *Brooke Group*, the Court expressly recognized that its standard might permit some anticompetitive price-cutting (*i.e.*, price-cutting that would exclude rivals on a basis other than efficiency). Specifically, the Court observed that above-cost pricing could sometimes be used to "induce or reestablish supracompetitive pricing," 509 U.S. at 224, and implicitly acknowledged that, even absent recoupment, below-cost pricing could allow a predator to establish short-term market power by injuring and driving out its rivals (until new competitors enter the market and drive the market price back down). *Id.* at 224-225; see *Matsushita*, 475 U.S. at 589; *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 233-234 (1st Cir. 1983) (Breyer, J.).

The Court concluded, however, that those categories of anticompetitive price-cutting would be "beyond the practical

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[5] As this Court further noted in *Matsushita*, "the success of [predatory pricing] is inherently uncertain," because "the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition." 475 U.S. at 589. As a result, "economic realities tend to make predatory pricing * * * self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the [predator]." *Id.* at 595.

ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." *Brooke Group*, 509 U.S. at 223. As the Court explained, a broader standard would run the risk of imposing liability in cases involving procompetitive price-cutting, and "the costs of [such] an erroneous finding of liability are high," *id.* at 226, because such errors (or "false positives") would "chill the very conduct the antitrust laws are designed to protect," *ibid.* (internal quotation marks and citation omitted). And the risk that such "false positives" will occur under a broader standard is substantial, the Court explained, because "[t]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition." *Ibid.* (internal quotation marks and citation omitted) (brackets in original).

2. *The Same Considerations That Led To Adoption Of The* Brooke Group *Standard Indicate That It Should Apply In The Predatory-Bidding Context As Well*

A claim of "predatory bidding" by a buyer in an upstream (or input) market closely resembles a claim of predatory pricing by a seller in a downstream (or finished-product) market. In both cases, as the court of appeals acknowledged, "the price level itself is the anticompetitive weapon." Pet. App. 8a. Like predatory pricing by a seller, predatory bidding by a buyer involves the manipulation of prices for the purpose of "eliminating competitors in the short run and reducing competition in the long run." *Cargill*, 479 U.S. at 117. Whereas a seller engaged in predatory pricing hopes to exploit its monopoly power by selling its product at *higher* prices in the future, a buyer engaged in predatory bidding hopes to exploit its monopsony power by purchasing the relevant input at *lower* prices. See *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, C.J.) (noting that "monopsony pricing * * *

is analytically the same as monopoly or cartel pricing and so treated by the law"), rev'd on other grounds, 522 U.S. 3 (1997); *Ball Mem'l Hosp., Inc.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.) (stating that "a monopsonistic depression of price is as bad as a monopolistic increase in price").

Despite the similarities between predatory-pricing and predatory-bidding claims, the court of appeals held that *Brooke Group* "does not govern" in this case, Pet. App. 13a, and that petitioner's bidding conduct could therefore be condemned even absent proof that petitioner suffered a short-term loss or that petitioner had a dangerous probability of recouping its loss. That conclusion was erroneous.

a. The Sherman Act Protects Competition Generally, Including Suppliers As Well As Consumers

As this Court has noted, "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). The Act "reflects a legislative judgment" that "ultimately competition will produce not only lower prices, but also better goods and services," and that "competition is the best method of allocating resources in a free market." *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978). The Act is designed to protect the "competitive process" generally, not particular participants in that process. *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 136-137 (1998); see, *e.g.*, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).[6] As the court

[6] Thus, the Department of Justice prosecutes bid-rigging cartels aimed at suppressing competition among buyers under Section 1 of the Sherman Act, 15 U.S.C. 1. See, *e.g.*, *United States* v. *Giordano*, 261 F.3d 1134, 1135-

of appeals acknowledged, therefore, the Sherman Act is "concerned with competition on the buy-side of the market as much as on the sell-side of the market." Pet. App. 6a.

In holding that *Brooke Group* was inapplicable in this case, the court of appeals lost sight of the Sherman Act's fundamental purpose: protecting competition as a whole, which is expected to inure to the benefit of consumers. See *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. Like aggressive price-cutting by a seller in a downstream market, aggressive bidding by a buyer in an upstream market is often (and indeed usually) procompetitive. See, *e.g.*, *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 925 (1st Cir. 1984) (Breyer, J.) (noting that a buyer's "competitive instinct" is to "bid up price"), cert. denied, 471 U.S. 1029 (1985). A buyer may aggressively bid for an input so that it can expand output immediately (or in anticipation of doing so in the near future), build up its inventory of the input to hedge against future price increases, or ensure that it obtains the input from a particularly reliable or high-quality supplier. In a market with inelastic supply, such aggressive bidding by a large buyer is particularly likely to increase the bid price of the input. While aggressive bidding may hurt a buyer's rivals in those circumstances, it does so only insofar as a buyer's higher bid "reflects the [buyer's] lower cost structure * * * and so represents competition on the merits." *Brooke Group*, 509 U.S. at 223.

1137 (11th Cir. 2001); *United States* v. *Romer*, 148 F.3d 359, 363 (4th Cir. 1998), cert. denied, 525 U.S. 1141 (1999); *United States* v. *Champion Int'l Corp.*, 557 F.2d 1270, 1272 (9th Cir.), cert. denied, 434 U.S. 938 (1977). Similarly, under Section 7 of the Clayton Act, 15 U.S.C. 18, the Department of Justice challenges mergers that threaten to have anticompetitive effects on the purchasing of inputs. See, *e.g.*, Competitive Impact Statement, *United States* v. *UnitedHealth Group, Inc.*, 71 Fed. Reg. 13,999 (2006); Competitive Impact Statement, *United States* v. *Cargill, Inc.*, 64 Fed. Reg. 44,054 (1999).

In the short term, moreover, vigorous competition among buyers for an input creates incentives for sellers to increase the quantity, or improve the quality, of that input. As then-Judge Breyer once noted in the predatory-pricing context, "[t]he antitrust laws very rarely reject such beneficial 'birds in hand' for the sake of more speculative (future * * *) 'birds in the bush.'" *Barry Wright*, 724 F.2d at 234. Input prices set through competitive bidding send important signals to the market, and harm to competition occurs only if the bidder is subsequently able to lower its bids below competitive levels and successfully recoups its losses.

As with predatory pricing, therefore, a rule that attempted to distinguish precisely between procompetitive and anticompetitive bidding would be "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate [conduct]," *Brooke Group*, 509 U.S. at 223, because "[t]he mechanism by which a firm engages in predatory [bidding]—[raising] prices—is the same mechanism by which a firm stimulates competition" in the input market, *id.* at 226 (first set of brackets in original). An increase in price may reflect nothing more than procompetitive expansion by a large buyer in a market with inelastic supply. Failure to apply the reasoning of *Brooke Group* in the predatory-bidding context thus could lead to "false positives" and thereby "chill the very conduct the antitrust laws are designed to protect." *Ibid.* (internal quotation marks and citation omitted); see Herbert Hovenkamp, *The Law of Exclusionary Pricing*, 2 Competition Policy Int'l 21, 35 (2006) (noting that "[t]he risks of overdeterrence and false positives are equivalent [in predatory-bidding cases] to those in predatory pricing cases").

b. Consumers Are Seldom Injured By, And Typically Benefit From, Aggressive Bidding In Input Markets, So Discouraging Such Conduct Would Be Contrary To The Goals Of The Antitrust Laws

gedly predatory bidding does differ from allegedly predatory pricing in that it could conceivably have effects in *two* markets: the upstream market (in which the bidding occurs) and the downstream market. In holding that *Brooke Group* was inapplicable in this case, the court of appeals focused almost exclusively on what it perceived to be the effects of an allegedly predatory bidder's conduct on consumers in the downstream market. Thus, the court explained that, in the short term, "[n]o consumer benefit results * * * if the firm raises or maintains the same price level for its finished products." Pet. App. 10a. Although the court recognized that downstream consumers might temporarily benefit from lower prices during the predation period, to the extent that the alleged predator lowered the price of its product while simultaneously putting upward pressure on the price of the relevant input, the court reasoned that such lower prices may actually be undesirable, to the extent that the alleged predator's competitors would be squeezed in both the input and output markets. *Ibid.* And in the long term, the court reasoned, downstream consumers would likely not benefit either, insofar as the alleged predator would likely not pass on the benefit of lower prices and could instead "charg[e] consumers a higher price" in order to "recoup the higher costs it had paid for its materials." *Ibid.*

While the interests of downstream consumers are indeed one proper focus of analysis, the court of appeals' reasoning concerning the downstream effects of the alleged conduct was fundamentally flawed. The court's assertion that consumers might be charged "higher price[s]" as a result of the alleged

predatory bidding necessarily assumes that the alleged predator had, or that its bidding conduct would confer, significant downstream market power, because a predatory bidder without significant market power in the output market would be unable meaningfully to raise prices in that market. See *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992); Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669, 676 (2005).[7] In this case, however, there is no reason to believe that petitioner possessed or obtained market power in the relevant downstream market: in rejecting respondent's claim that petitioner had engaged in monopolization or attempted monopolization of the market for finished alder lumber, the jury found that there was no distinct market for finished alder lumber, and the record reflects that petitioner's share of the North American market for finished hardwood lumber was less than 3%. J.A. 700a, 967a. Regardless of whether petitioner was engaged in predation in the market for alder sawlogs, therefore, petitioner could not have raised prices in the downstream market for finished hardwood lumber—and any alleged predation in this case therefore would have had no significant adverse effects on consumers in the downstream market.

The only circumstance in which downstream consumers would unambiguously be harmed by predation in an upstream market is when the alleged predatory bidder *acquires* signifi-

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[7] To the extent that the bidder increases production of its finished product as a result of its increased acquisition of the relevant input (and thereby increases the amount of that product available on the market), consumers in the downstream market may temporarily benefit from *lower* prices (until the market returns to equilibrium), even in the absence of significant market power by the bidder in the downstream market. Without such market power, however, there would be no possibility of subsequently imposing higher prices in the downstream market, as the court of appeals suggested. See Pet. App. 10a.

cant market power in the downstream market (and is thus able to raise prices in that market) as a result of its predatory behavior. In that situation, however, the bidder would be subject to Section 2 liability on the discrete theory that it had engaged in monopolization or attempted monopolization of the *downstream* market by engaging in predatory bidding in the *upstream* market: *e.g.*, by subjecting rivals in both the upstream and downstream markets to a "price-cost squeeze." See *Cargill*, 479 U.S. at 114; see generally Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986). In this case, the jury expressly rejected respondent's discrete claim that petitioner had engaged in monopolization or attempted monopolization of the downstream market. J.A. 967a. Where, as here, the defendant lacks significant market power in the downstream market (and has no substantial prospect of acquiring it through upstream predation), any alleged predation is unlikely to have an adverse effect on downstream consumers.[8]

The critical point with respect to downstream consumers is that they, like sellers in the input market, will ordinarily benefit from aggressive bidding in the upstream market. That is because vigorous competition in that market ensures that inputs are efficiently allocated to the bidders that are best able to use them, thereby benefiting those bidders that are the most efficient producers (and creating incentives for other bidders to become more efficient). Those producers that are

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[8] Moreover, to the extent that aggressive bidding in the upstream market has even incidental effects on consumers in the downstream market, the *Brooke Group* test would naturally take into account those effects, insofar as changes in the downstream price would naturally affect the alleged predator's revenue (and therefore affect both whether the alleged predator has suffered a short-term loss and whether the alleged predator has a dangerous probability of recoupment).

most efficient, in turn, are precisely those that are most likely to generate innovations (or cost savings), which will benefit consumers in the future. And vigorous competition by sellers of inputs, with resulting improvements in the production of those inputs, will likewise benefit consumers, as the court of appeals recognized. See Pet. App. 11a. A test that more broadly penalized aggressive bidding, like the one endorsed by the court of appeals, would ultimately disserve consumers by prohibiting (and deterring) firms from engaging in procompetitive conduct.

3. *The* Brooke Group *Standard Is Readily Adaptable To The Predatory-Bidding Context*

The *Brooke Group* standard can easily be applied to a claim of predatory bidding. In order to prevail on such a claim, a plaintiff should be required to show (1) that the defendant suffered (or expected to suffer) a short-term loss as a result of its allegedly higher bidding and (2) that the defendant had a dangerous probability of recouping its loss through the exercise of monopsony power.

The first prong of the standard will require consideration of the relationship between (1) the cost that the defendant incurred (or expected to incur) for its finished product (taking into account its allegedly predatory bidding for the relevant input) and (2) the revenue that the defendant received (or expected to receive) for that product.[9] In keeping with the ap-

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[9] To be sure, while the *Brooke Group* standard in the predatory-pricing context focuses on a comparison of costs and revenues in the allegedly manipulated market, any cost-revenue comparison in the predatory-bidding context would focus on the *downstream* market (rather than the allegedly manipulated upstream market). Absent some objective indication that the price paid for the input is excessive, however, there is no basis for attributing an unlawful motive to a company's increase in purchases of an input, even when it has the effect of increasing the prevailing market price for that input.

proach followed in *Brooke Group* with regard to predatory-pricing claims, see 509 U.S. at 222 n.1,[10] the Court need not specify exactly how cost (or revenue) should be calculated under the first prong of the standard.[11] At a minimum, however, a reviewing court should evaluate a defendant's profit or loss from the perspective of the time of the allegedly predatory bidding, lest the defendant be held liable simply because it overestimated the eventual sale price or because it failed to foresee an increase in other components of its cost (*e.g.*, a spike in oil prices), thereby causing it to sell at a loss. Cf. *Stop & Shop Supermarket Co.* v. *Blue Cross & Blue Shield*, 373 F.3d 57, 62 (1st Cir. 2004) (noting that "the antitrust laws are not meant to police bad management").

Moreover, a plaintiff should be required to show that the defendant suffered a short-term loss even if the cost of the relevant input constituted only a small percentage of the cost of the finished product. In this case, the relevant input—alder sawlogs—accounts for as much as 75% of an alder sawmill's total cost in producing finished lumber. J.A. 169a. Where the input constitutes only a small percentage of a defendant's overall cost, however, the input likely represents only a small percentage of the overall cost of the defendant's rivals as well, thereby reducing the likelihood that the defendant's aggressive bidding for that input will drive its rivals out of the input market. To the extent that the short-term-loss requirement

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[10] Since this Court's decision in *Brooke Group*, "no consensus has emerged as to what the most 'appropriate' measure of cost is in predatory pricing cases." *United States* v. *AMR Corp.*, 335 F.3d 1109, 1115 (10th Cir. 2003).

[11] The jury instruction in this case did not require any finding that petitioner suffered a short-term loss. Should the Court agree that the court of appeals erred by rejecting the *Brooke Group* standard, it would be appropriate to allow the lower courts to elaborate on the short-term-loss requirement on remand.

will only rarely be met in cases in which the input constitutes a small percentage of a defendant's overall cost, therefore, it is simply because predatory bidding will only rarely be successful in those cases.

The second prong of the standard will require a demonstration that the defendant was likely to recoup its losses in the long term. That requirement is an "indispensable aspect" of the standard for predatory-pricing claims. *Brooke Group*, 509 U.S. at 232.[12] And it is equally indispensable for predatory-bidding claims, because, when the alleged predator does not have a dangerous probability of such recoupment, there is an insufficient risk that the alleged predator would be able to exploit monopsony power for a significant length of time, and thus no significant threat to competition. Indeed, although the court of appeals approved a jury instruction that did not include a recoupment element,[13] it recognized that, "to

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[12] In fact, Judge Easterbrook has suggested that the likelihood of recoupment should be the "initial hurdle" for a predatory-pricing claim, such that "[o]nly if market structure makes recoupment feasible need a court inquire into the relation between price and cost." *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989), cert. denied, 494 U.S. 1019 (1990).

[13] The jury *was* instructed that, in order to prevail on its predatory-bidding theory, respondent was required to prove that "there was a dangerous probability that [petitioner] would achieve its goal of monopoly power in the relevant market." J.A. 980a. It does not necessarily follow from such a finding, however, that petitioner had a dangerous probability of successful recoupment of any short-term losses attributable to predation. In order to recoup its losses, a predator not only must achieve some degree of market power, but must achieve enough market power, and maintain it for long enough, to effectuate recoupment. See *Matsushita*, 475 U.S. at 589 (noting that "[t]he success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain"). And a predator's ability to maintain monopoly power would likely be tested, to the extent that the lower price of the input draws rival buyers into that market. Accordingly, the instruction at

carry out a predatory bidding scheme successfully, a firm would have to recoup the higher costs it had paid for its materials." Pet. App. 10a. A rule permitting a predatory-bidding claim to proceed even absent a showing of recoupment would inevitably penalize aggressive but procompetitive conduct.

4. *The* Brooke Group *Standard Is Fully Applicable In Predatory-Bidding Cases Without Regard To Considerations Of Supply Elasticity*

There is no valid justification for refusing to apply the *Brooke Group* standard in this case. The court of appeals seemingly left open the possibility that the *Brooke Group* standard could apply in *some* predatory-bidding cases, stating at one point that the *Brooke Group* standard does not apply here because "this case involves predatory bidding *in a relatively inelastic market*." Pet. App. 11a (emphasis added). To be sure, if supply in the input market at issue is inelastic, it is more likely that an attempt to engage in predatory bidding will be successful, because it is more likely both that prices will increase in the short term without significantly increasing supply (thereby facilitating injury to the predator's competitors) and that prices can be forced down in the long term without significantly reducing supply (thereby facilitating recoupment).[14] But it is also more likely that increased purchasing by a large buyer, which is usually a manifestation of procompetitive expansion, will cause an increase in the bid price (and thereby generate allegations of predatory bidding). Accordingly, an inelastic market is precisely where the need to distin-

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issue did not focus on the critical issue, which is the ability to maintain, not obtain, monopoly power.

[14] Barriers to entry (whether for buyers or for sellers in the input market) may also increase the likelihood that an attempt to engage in predatory bidding will be successful.

guish between procompetitive and anticompetitive bidding is most acute.

In addition, to the extent that predatory *bidding* is more likely to be successful in a case in which supply in the relevant input market is inelastic, the same could be said about predatory *pricing* in a case in which demand in the relevant consumer market is inelastic (insofar as it would be easier to force out rivals, and to recoup losses, in such a market than in a market with elastic demand). In *Brooke Group*, however, the Court attached no independent significance to demand elasticity in the predatory-pricing context, instead focusing solely on the existence of a short-term loss and the likelihood of recouping that loss. The Court certainly did not suggest that its two-prong standard would be inapplicable in the context of a market with inelastic demand. There is no basis for a different approach in the predatory-bidding context.

Moreover, any limiting principle based on "relative inelasticity" would be entirely unworkable, as it would entail endless ambiguity and uncertainty. Such a rule would necessitate a complex and costly market-by-market assessment of supply elasticity, thereby frustrating the compelling need for clear, objective, and easily administrable rules to govern pricing behavior. Firms seeking to expand their output would be uncertain as to the standard by which their conduct would be judged, and procompetitive conduct would likely be chilled. See pp. 28-29, *infra*. Accordingly, the *Brooke Group* standard should apply to a predatory-bidding claim regardless whether it involves a market with "relatively inelastic" supply.[15]

Respondent contends (Supp. Br. in Opp. 2) that it would be premature to apply the *Brooke Group* standard to predatory-

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[15] In addition, the jury made no factual findings on supply elasticity in the Pacific Northwest market for alder sawlogs, and it appears to be a disputed issue. See Pet. Cert. Reply Br. 4 n.3; Campbell Group et al. Amici Curiae Cert. Br. 12-13 & nn.4-5.

bidding claims because there is no substantial body of case law or academic literature concerning the likelihood of "false positives" in cases involving such claims. To be sure, as the government indicated in its brief at the certiorari stage (at 19 n.13), predatory-bidding claims, at least to date, have been less common than predatory-pricing claims.[16] As this Court has emphasized, however, the risk of prohibiting (or deterring) procompetitive behavior is a matter of concern in all contexts involving unilateral conduct. See, *e.g.*, *Verizon*, 540 U.S. at 414 (noting that "[t]he cost of false positives counsels against an undue expansion of § 2 liability"). And in any event, there is no reason to believe that the risk of "false positives" would be any lower in the context of predatory bidding than it would be in the context of predatory pricing. There is thus no reason to apply a more generous liability standard to predatory-bidding claims than to predatory-pricing claims.[17]

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[16] There is, however, a growing body of academic literature that discusses the subject of predatory bidding. See, *e.g.*, Hovenkamp, *supra*, at 35-38 (noting, *inter alia*, that the jury instruction approved in this case constitutes "an antitrust disaster of enormous proportions"); John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. 625, 652-668 (2005); Salop, *supra*, at 709-714; Richard O. Zerbe, Jr., *Monopsony and the* Ross-Simmons *Case: A Comment on Salop and Kirkwood*, 72 Antitrust L.J. 717, 717-725 (2005).

[17] The court of appeals did not address respondent's claim that petitioner had engaged in "overbuying" (*i.e.*, buying more sawlogs than necessary and allowing them to spoil). See Pet. App. 18a & n.42. This case therefore does not present the question of how to analyze such an "overbuying" claim, and the court of appeals should consider that claim on remand (along with respondent's claims that petitioner engaged in other types of exclusionary conduct) in assessing whether respondent's remaining claims should be resubmitted to a jury. We note only that a buyer's decision to stockpile an input may be procompetitive—and that the mere fact that some of the input is ultimately not used may indicate only that the buyer's initial decision was erroneous (*e.g.*, because the buyer overestimated demand for its finished product). To the extent that a buyer instead stockpiles a scarce

B. The Court Of Appeals Erred By Upholding A Jury Instruction That Would Allow A Plaintiff To Prevail On A "Predatory Bidding" Claim Simply By Showing That The Defendant Paid A Higher Price Than Necessary For An Input

1. Having rejected the *Brooke Group* standard for respondent's predatory-bidding claim, the court of appeals sanctioned an instruction that permitted the jury to find that petitioner had engaged in exclusionary conduct if petitioner "paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price." Pet. App. 14a n.30; see J.A. 978a. For the reasons already stated, that instruction is flawed, because it would permit the imposition of liability for predatory bidding absent a showing that the alleged predator had met either of the *Brooke Group* requirements. Such a broad standard for liability would fail to ensure that the challenged conduct was truly anticompetitive in nature, *i.e.*, that it would "exclude rivals on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605 (citation omitted).

The specific jury instruction on predatory bidding, moreover, was in no way qualified by the other jury instructions on exclusionary conduct more generally. Those instructions advised the jury that, in determining whether conduct is exclusionary, it should consider whether "the conduct lacks a valid business purpose" or if "the anticipated benefits of the

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input for the purpose of keeping the input out of the hands of its competitors and allowing some of the input to go to waste (and absent any claim that the buyer was thus engaging in monopolization or attempted monopolization of the *downstream* market), it may be appropriate to analyze such a claim as a predatory-bidding claim subject to the *Brooke Group* standard—and to take into account the amount paid for the wasted input in determining whether the buyer suffered a short-term loss.

conduct flow primarily from its tendency to hinder or eliminate competition." J.A. 977a. The specific jury instruction on predatory bidding, however, made clear that, if the jury found that petitioner had "paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price," the jury "may regard [petitioner's conduct] as an anti-competitive act," without regard to any other considerations. J.A. 978a; see Pet. App. 7a n.8 (describing the specific instruction as the "relevant * * * instruction" for purposes of respondent's predatory-bidding claim). The other instructions did not require that respondent prove either the existence of a short-term loss or the likelihood of recouping that loss—nor did they elaborate on how the jury should determine whether the price paid by petitioner was "higher * * * than necessary," or what would have constituted a price that was "fair" to respondent. The other instructions therefore did not cure the deficiencies in the specific instruction on predatory bidding.

2. The specific instruction approved by the court of appeals is also flawed because it failed to supply an objective standard by which the alleged predator's conduct was to be measured, and instead established a standard that would allow a jury to award treble damages based on a subjective determination of whether the price paid for the relevant input was "higher * * * than necessary" or not "fair." See, *e.g.*, *Spectrum Sports*, 506 U.S. at 459 (noting that "[t]he concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics"); *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) (asking "how * * * a judge or jury [is] to determine a 'fair price'"), cert. denied, 499 U.S. 931 (1991); 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 111(d), at 102

(2d ed. 2000) (stating that "'fairness' is a vagrant claim applied to any value that one happens to favor").

If allowed to stand, such a subjective standard would have the effect of deterring procompetitive conduct by large firms. As then-Chief Judge Breyer explained, antitrust rules "must be clear enough for lawyers to explain them to clients" and "must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings." *Town of Concord*, 915 F.2d at 22. If the line between lawful aggressive bidding and unlawful predatory bidding were to turn on a jury's *ex post* assessment of whether the price paid for an input was excessive, large firms competing for inputs would rationally err on the side of caution, pull their competitive punches, and bid less aggressively. In contrast to the *Brooke Group* standard, therefore, an amorphous standard such as the one endorsed by the court of appeals would "discourage the competitive enthusiasm that the antitrust laws seek to promote," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 775 (1984), and "chill the very conduct the antitrust laws are designed to protect," *Matsushita*, 475 U.S. at 594.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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